IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-668

IRVING M. MOLEVER; BETTY BERNSTEIN; SHIRLEY L. WEINBERGER, as Custodian for LYNN E. WEINBERGER, a Minor, JILL A. WEINBERGER, a Minor and AMY D. WEINBERGER, a Minor; DON D. BROOKS; MODERN MARTS INC., a Pennsylvania Corporation; JEAN B. PARIS; PITTSBURGH AND WEST VIRGINIA INVESTMENT COMPANY, a Corporation,

Petitioners,

v.

ROBERT LEVENSON; DONALD LEVENSON; REICHART FURNITURE COMPANY, a West Virginia Corporation; THE BANK OF WHEELING, a West Virginia Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

I. The Facts Stated in the Petition for Writ of Certiorari Are Supported by the Record.

Petitioners feel constrained to respond to certain misstatements of the record made by respondents in their

Brief in Opposition to Petition for a Writ of Certiorari ("Brief in Opposition"). Respondents apparently do not otherwise challenge petitioners' statement. See Sup. Ct. Rules 24.1, 40.3.

First, respondents assert that there is no evidence in the record that the Levensons were present during discussions by the bank's Board of Directors of the proposed settlement releasing the Levensons from liability for their fraudulent floor plan activities (Brief in Opposition, pp. 3-4).[1] The fact is that Hungerman, the then president of the bank, testified at trial on direct examination by *defendants* that the Levensons were present during such discussions (NT 4083-84), a fact also established by the board minutes.[2]

1. Neither the Fourth Circuit nor respondents challenge petitioners' statement that the Levensons were present at the time of the voting on the release—itself a violation of the state statute which prohibited their presence while the matter was "being considered." West Virginia Code, 1931, as amended, § 31-1-69 (repealed effective July 1, 1975). See Petition for Writ of Certiorari ("Petition"), App. B, p. 38a; Brief in Opposition, pp. 3-4.

2. The Levensons' presence during board discussions and vote is reflected in the exhibits cited at page 10 of the Petition for Writ of Certiorari. The chronology is as follows: At a board meeting held February 23, 1967, attended by the Levensons, the board voted (with the Levensons present) to accept a settlement proposal releasing the Levensons from liability (D-49). On March 30, 1967, the board voted (with Donald Levenson present during discussion and vote) among other things to return to Levenson $1,000 which had been tendered by him to the bank in connection with a previously proposed floor plan release agreement (D-606; see also NT 4098-108, 4122). On April 27, 1967, after negotiations had been reopened, *with both Levensons present during discussion and vote,* the board rescinded "its action of the past two meetings" and voted to authorize execution of a settlement agreement by Hungerman (D-50, attached hereto as Exhibit 1, see pp. 5a-7a; NT 4108-10, 4116-22). The settlement agreement was executed on May 10, 1967 (D-170). This succession of events resulting in the giving of the release occurred despite the clear notice to the bank's board of *apparent federal criminal violations,* as noted in a Federal Deposit Insurance Corporation investigative report (Ex. P-60, P-61). Hungerman's testimony is attached hereto as Exhibit 2.

Thus, respondents' contention is clearly erroneous.[3]

Second, respondents state that petitioners did not, in their petition for rehearing in the Fourth Circuit,[4] complain of the trial curtailment or of any prejudice to them (Brief in Opposition, pp. 8-9). The fact is, however, that closely following that portion of the petition for rehearing quoted by respondents (Brief in Opposition, Exhibit C), the petition for rehearing contained on page 11 thereof the following statement:

> "If the defendants were deprived of the opportunity to put on evidence and witnesses, so, too, . . . [was the plaintiff] in the defamation suit deprived of the opportunity to put on additional evidence of malice. Inasmuch as this Court has seen fit to enter judgment in favor of the defendants in the defamation suits because of the erroneous conclusion that there was insufficient evidence of actual malice, the petitioners submit that such additional evidence was not introduced because of petitioner's compliance with the time management plan. Consequently, the defamation suit, if reversed at all, should be remanded for new trial on the same basis that this Court has remanded the Dennis losses."

The petition for rehearing concluded (p. 15) with an alternative request that all of the suits be remanded for new trial.[5]

3. The Fourth Circuit's characterization of the evidence as "incontrovertible" was narrowly directed to the action of the February 23, 1967 board meeting, which action was later rescinded.

4. Petition for a Rehearing or in the Alternative Rehearing in Banc by Appellees in Case No. 75-1107 and by Appellants in Case No. 75-1108.

5. Respondents' complaint that petitioners in the Fourth Circuit offered a defense of the trial court's management of the case (Brief in Opposition, p. 9) is itself ample evidence of the practical

Finally, respondents aver that petitioners have "misrepresented" the Fourth Circuit decision (Brief in Opposition, p. 2). On the contrary, the Fourth Circuit, in affirming the entry of judgment n.o.v. in favor of defendants in the defamation suit, clearly sanctioned a departure by the trial court from this Court's decisions.[6]

II. Petitioners Had Standing to Maintain the Stockholders' Derivative Suit.

Respondents also urge that, had the Fourth Circuit reached their argument that petitioners lacked standing to maintain the floor plan and Dennis loans derivative suit, "it is difficult to see how it could have avoided holding that the trial court should have dismissed the stockholders'

5. (Cont'd.)
difficulties which confront a verdict-winner who, prior to appellate decision, (1) argues in support of the trial court's actions but (2) alternatively argues for a new trial. See *O'Hare v. Merck & Company, Inc.*, 381 F. 2d 286, 294-95 (8th Cir. 1967) (*rehearing denied*) (dissenting opinion).

6. The trial court referred extensively to what it conceived to be controlling constitutional decisions involving defamation (Petition, App. A, pp. 16a-18a), expressly held that plaintiff Irving Molever was a public figure "as a bank president, or as a recently terminated bank president" (Petition, App. A, p. 19a), and concluded (Petition, App. A, pp. 20a-21a):

> "Based on the record we have here and *recognizing again, the restrictive contracting field of libel and slander,* it would appear that the statements and the expressions that were made here were made in good faith insofar as this record is concerned. . . .
>
> ". . . *The Court is always reluctant to invade that province of the jury, but here this plaintiff is a person who chose to put himself in the public lime light as the law has now evolved. . . .*" (Emphasis added.)

The Fourth Circuit sanctioned the trial judge's deviation from this Court's First Amendment decisions with its cursory statement that (Petition, App. B, pp. 44a-45a):

> "Furthermore, his ruling that the evidence was insufficient to allow the jury to find malice or ill-will was a correct legal conclusion."

derivative suit" (Brief in Opposition, p. 5). This is sheer unsupported speculation. Moreover, the Fourth Circuit obviously would not have accepted, nor did it accept, that argument, as is shown by its remand of the Dennis loans phase of the derivative suit for a new trial (Petition, App. B, p. 42a; see also Brief in Opposition, p. 10, n. 6, in which respondents recognize that this argument was not accepted by the Fourth Circuit, as shown by the remand, an argument that had been rejected previously by the trial court, N.T. 24-25).

Significantly, there appears no applicable authority to sustain respondents' contention that petitioners lacked standing to press the floor plan derivative suit. See *Sweet v. Bermingham*, 65 F. R. D. 551, 554 (S. D. N. Y. 1975); *Jannes v. Microwave Communications, Inc.*, 57 F. R. D. 18, 22-23 (N. D. Ill. 1972).

CONCLUSION.

For the foregoing reasons the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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EXHIBIT 1.

Trial Exhibit D-50 (NT 4116-22).

BOARD OF DIRECTORS MEETING

April 27, 1967

ABSENT: Carl E. Ballentine, James B. Fahey and J. T. Soffer.

CORRECTIONS: To the minutes of the March 30, 1967 meeting.

1) Propollo loan, reported no payments, this was true at the time of the meeting, but since then, there have been two (2) payments made.
2) Financial Statement: Change, "after the vote was taken" to "before the vote was taken."
3) Profit: Change, "to $6,700.00 on a cash basis and not not on an accural".
4) Overdraft: Should state $74.38 by thirty (30) overdrawn accounts
5) Cash Item: "in the amount of $10.00."

Moved by Mr. Woods that the minutes be accepted as corrected and was seconded by Mr. Clark. Carried.

Mr. Barnes asked into the meeting as the banks [sic] counsel.

Executive Committee minutes of April 6th, April 13 and April 30th were read.

CORRECTIONS: To the minutes of April 6th.

1) That the request for a Stock Holders meeting which we received did not comply with and as required by the By Laws.

2) April 13th minutes: Add that Mr. Smiley and his attorney were meeting with President Hungerman, in the Bank, and that *Donald Levenson* was called to the meeting by Mr. Hungerman.

3) Funds that are deposited with the Pittsburgh National are secured over $45,000.00. Change: That federal funds sold amount to over $45,0000.00 and that they are secured by U. S. Government Bonds or Government Agency Bonds.

4) April 20th minutes: Delete the name of Joseph Dusci as having made the loan.

Item #4

Nomination of Officers

Nominated besides the President were:

John S. Corey .....Vice President and Cashier
T. Z. Obecny .....Assistant Cashier
Eleanor D. Kupchak .....Assistant Secretary

Moved: By *Donald Levenson* ° that the nominees serve at the will and pleasure of the Board and that the Secretary cast an unanimous vote. Seconded by Mr. Reiter. Carried.

Moved: By Mr. C. Woods that we nominate Dr. John Braddock as Chairman of the Board, and that the Secretary cast the unanimus [sic] vote. Seconded by *Mr. Robert Levenson.* Carried.

Moved: By N. Mansuetto that Charles Woods be nominated for Secretary. Seconded by Mr. Clark.

Moved: By Charles Perelman that nominations be closed. Seconded by Mr. Clark. Motions carried.

° Emphasis on the Levensons' names added throughout.

Item #5

Appointment of the Executive Committee

Recommended to be members of the Executive Committee: Dr. J. Braddock Charles Perelman *Robert Levenson* Charles Woods and E. Blaine Hungerman.

Moved: By *Donald Levenson* that we approve the recommendations of the President of those he wishes to serve on the Executive Committee. Seconded by Dr. John Braddock. Carried.

Item #6

Installment Loan Committee

Recommended by Mr. Hungerman to serve on this committee: N. Mansuetto, *Donald Levenson,* S. Russek Charles Perelman, *Robert Levenson,* and E. Blaine Hungerman.

Moved: By Dr. J. Braddock, that the recommendations of Mr. Hungerman. Seconded by H. Otto. Carried.

Item #7

Report of Officers (by Mr. Hungerman)

Our deposits are holding up very well. Loans $2,731,000.00 at the close of business, April 26, 1967.

Demand of checking accounts	$1,392,000.00	(rounded figures)
Savings accounts	1,838,000.00	
Time Deposits	1,562,000.00	
X-Mas, vacation & savings bond deposits	55,000.00	
TOTAL	$4,848,000.00	

It was called to the Board's attention that no interest had been accrued to pay on the Time Certificates which come due in July and August. We have approximately $60,000.00 to pay out in the rest of this year.

1) Before Mr. Hungerman will make changes in the accounting system he will confer with the auditors, which the Board select.
2) The figures which he has presented, in a sense do not mean a thing. They apparently attempted an accural system of accounting last year, but gave it up and a cash basis was continued.
3) Present C/D's are now being made at 4¼%. Those for less than $1,000.00 and for shorter terms than a year will be on a sliding scale.
4) Because of the free checking accounts we have an excessive payroll. He will make recommendations later.

MOVED: By N. Mansuetto, that we accept the financial statement. Seconded by Dr. J. Braddock. Carried.

ITEM #8

EXAMINING COMMITTEE

Donald Levenson reported that the Committee would have no recommendation for an auditor until the next meeting. In the discussion that followed Mr. Hungerman expressed his opinion that we have a very complete audit this year. It is very important that we know that our assets and liabilities are properly recorded. Auditing firms were discussed and that in the opinion of last year's auditors, the records did not fairly represent the true condition of the Bank. The audit could *not* be certified because certain things were missing from the records.

ITEM #9

STATEMENT FROM THE BIG WHEEL

Letter dated February 2, 1966, addressed to Ron Soloman and handed to Mr. Hungerman before he left, signed by Mrs. M. R. Myers, Office Manager was discussed. Motion by R. Reiter that we deny payment of the bill presented to us by the Big Wheel. It was duly seconded and carried.

ITEM #10

LETTER FROM ATTORNEY JOSEPH GOMPERS

1) Stating that *the Levensons* refuse to idemnify the "past directors"
2) They agreed to include "any governmental agencies". In view of this reply, Mr. Hungerman, after conferring with the Executive Committee, got in touch with attorney A. W. Petropolus for an outside opinion.

ITEM #11

LETTER FROM ATTORNEY A. W. PETROPOLUS

1) The agreement did hold the Bank safe and harmless.
2) The directors provided that they had nothing to do with the matter were held safe and harmless without naming them as individuals. Therefore it was unnecessary for their names to appear in the agreement or to be referred to as present and past directors. The discussion between the Chair and Director Reiter, pointed out that no matter what arguments any director might present the

fact remained that *the Levensons* were not going to name the directors and secondly, every director including Reiter, had to admit that Attorney Petropolus was well respected by and in good standing with all of the Bar Associations. That he had years of experience in banking having been associated with the Security Bank as their attorney for many years. He had rendered an unbiased opinion since he had no axe to grind. Concluding that it would be a further waste of the Boards [sic] time to even consider further discussion that we would be acting wisely on the advise of outside counsel and conclude the matter. The minutes of March 30th and April 27 having been read as part of the discussion.

MOVED: By C. Perelman that the Board rescind its action of the past two meetings. After a full discussion. Seconded by Dr. J. Braddock.

ROLL CALL VOTE:

Abstaining (3)—*D. Levenson, R. Levenson,* and Dr. H. Gordon

Voting No (2)—R. Reiter and H. Otto

Voting Yes (7)—Carried.

Charles Perelman restated his second motion, followed by discussion and the final form: That the President be authorized to execute an agreement which agreement indemnifies The Bank of Wheeling holding it safe and harmless against any contingent claims that might be made by suppliers, distributors, manufacturers and governmental agencies. The amount as stipulated by the

FDIC corporation in their report, $14,270.05 will be held in escrow in this Bank. That this escrow will be reviewed prior to the end of six (6) months. Motion seconded by Dr. J. Braddock. Roll call requested.

Abstaining (3)—*D. Levenson, R. Levenson,* and H. Otto

Voting No (1)—R. Reiter

Voting Yes (8)

R. Reiter—I would like it in the minutes, Mr. Secretary, my reason for voting no. I am satisfied with the amount of the escrow that *the Levensons* have deposited. I personally do not know whether the practice that was done was a wrongful or illegal practice, but I do feel that as a member of the Board of Directors, I am not charging *the Levensons* with any wrong doing and never have. I feel that as a member of the Board of Directors of this banking institution all of those who have served from the time the alledged [sic] Free Floor Planning took place, that particularly those and those who served thereafter if the Floor Planning was a wrong doing or an improper act, would have a personal liability and responsibility, and for that reason, I feel the present as well as the past members of the Board of Directors, should be included in such save-harmless agreement.

The Chair asked the Secretary to report the vote. One voting no, three abstaining and eight yes. The motion was declared passed.

H. Otto—My reason for abstaining is based on the fact that the actual proposal, as ammended [sic] was not in evidence. I consider that a vote on such a vital matter should have been better substantiated.

Chairman of the Board Dr. John Braddock, presiding.

Mr. Barnes was asked to return to the room.

Mr. Hungerman then asked for an expression from the Board on the following:

1) Wheather [sic] he should have Mr. A. W. Petropolus draw up the agreement.

MOVED: By Dr. Gordon, that Mr. Hungerman pursue it in the vein he has. Seconded by H. Otto. After some discussion Otto withdrew his second. Reseconded by S. Russek. Abstaining H. Otto. Motion carried.

2) Shall we hold it up until the next Board Meeting before having it executed, and under whose authority shall I execute it. Reviewing shall be by the Executive Board, *R. Levenson* abstained. The Board was asked to appoint a substitute. None appointed or volunteered. Therefore the remaining Executive Committee members were to act.

3) Approval to pay Mr. A. W. Petropolus for his services. In the discussion the fee was determined to be reasonable. All agreed that this bill shall be paid.

Dr. Gordon addressed a question to counsel about the bond situation and was answered in full by Mr. Barnes.

ITEM #12

TIME AND DAY OF FUTURE BOARD MEETINGS

After a general discussion, it was moved and regularly passed that the Board of Directors will meet at 9:00 A. M. and on the 3rd Thursday of each month. Carried.

MOVED: By C. Perelman that the Board adopt the following resolution:

RESOLVED: That the following statement of facts is to correct some of the substantial misrepresentations made in letters which appeared over the names of Henry P. Otto and Don D. Brooks.

1) Don D. Brooks is not a Director of The Bank of Wheeling.

2) The Board of Directors regret the mailing of letters the contents of which are in violation of the rules issued by the Federal Deposit Insurance Corporation and the West Virginia Department of Banking.

3) Our Bank has not suffered any financial loss in the "Free Floor Plan" nor is any loss anticipated.

4) Neither the Federal Deposit Insurance Corporation or the Board of Directors required an Escrow Account to cover any claims but it was a voluntary act by Reichart Furniture Company and *the Levensons.*

Motion was seconded by R. Reiter. Carried.

/s/ CHARLES C. WOODS JR.
Charles C. Woods Jr.
Secretary

/s/ E. B. HUNGERMAN
Pres.

EXHIBIT 2.

Testimony of E. Blaine Hungerman (NT 4083-84).

"Q. Now, during the time that this release was taken under consideration by the Board of Directors, I'll ask you whether or not the Levensons were members of the Board and were present during the discussion of this release?

"A. As I recall, they were in on some of the discussions.

"Q. In your office or at the Board meeting?

"A. At the Board meeting.

"Q. And did they discuss with the Board the actual release or were they present during the Board meetings?

"A. They left the Board room when it came up for resolution of vote.

"Q. And were they present during the discussions—

"A. (Interposing)—Yes.

"Q. Of the floor plan by the Board members?

"A. Yes."